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In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID DIAMOND, also known as DAVID DUMANUS, DAVID THORNSON and ABE SLATER,

and

FREEDA DIAMOND, also known as FRIEDA DIAMOND and FLORENCE SLATER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the order of the United States District Court for the Southern District of California, which had dismissed the actions for denaturalization against respondents.

OPINIONS BELOW

The opinion of the Court of Appeals and the separate opinion of Judge Fee (App., *infra*, pp. 7-11)

have not yet been reported. The opinion of the District Court (R. 36-38) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1957 (App., *infra*, p. 11). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether proceedings to set aside orders of naturalization by reason of illegality and fraud must be dismissed because the affidavits of good cause—furnished to the United States Attorney at the time of the complaint, exhibited to one of counsel for respondents at the pre-trial conference, and filed during the first day of the trial—were not filed at the time of filing of the complaints.

STATUTE INVOLVED

Section 340 (a), Immigration and Nationality Act of 1952 (66 Stat. 260, 8 U.S.C. 1451 (a)):

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact

or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

STATEMENT

On November 1, 1954, the government filed a complaint against each of the respondents to set aside their naturalization, alleging concealment, wilful misrepresentation and illegality in the naturalization proceedings in that respondents had falsely denied the use of certain aliases and had made misrepresentations with respect to their membership in the Communist Party and their intentions at the time of filing of the petitions for naturalization (R. 1-20).

The United States Attorney was in possession of affidavits showing good cause at the time of the filing of the complaints but, pursuant to the departmental policy of that time, the affidavits were not filed with the complaints (Stipulation, R. 124-126).

Respondents, by motions filed in March 1955, sought dismissal of the actions on the ground that the court was without jurisdiction because the complaints were not "supported" by an affidavit showing good cause (R. 20, 22). The motions were denied on March 21 and May 31, 1955, respectively, upon authority of *Schwinn* v. *United States*, 112 F. 2d 74 (C.A. 9), affirmed, 311 U.S. 616 (R. 20-23, 36).

A copy of the affidavit was shown, at the pre-trial conference, to counsel for respondent Freeda Diamond and he was advised that the affidavits would be intro-

duced at the trial as to both defendants (R. 125-126). During the first day of the trial, on February 28, 1956, the affidavits were admitted in evidence, subject to later ruling thereon upon handing down of the decision of this Court in the then pending case of *United States* v. *Zucca*, 351 U.S. 91 (R. 125-127). On July 26, 1956, subsequent to the decision in *Zucca*, *supra*, the trial judge dismissed the actions without prejudice (R. 36-39). The Court of Appeals for the Ninth Circuit affirmed (App., *infra*, pp. 7-11).

ARGUMENT

The decision below is in direct conflict with decisions of the Second Circuit to the effect that in a denaturalization suit the filing of the affidavit of good cause after the complaint does not deprive the District Court of jurisdiction to determine the issues raised by the complaint. *United States* v. *Lucchese*, 247 F. 2d 123 (C.A. 2), petition for a writ of certiorari pending, No. 450, this Term; *United States* v. *Costello*, 247 F. 2d 384, 387 (C.A. 2), petition for a writ of certiorari pending, No. 494, this Term. See also *United States* v. *Matles*, 247 F. 2d 378 (C.A. 2), petition for a writ of certiorari pending, No. 378, this Term.[1] The statement in the opinion below that the *Lucchese* and *Costello* decisions present "somewhat different" facts (App., *infra*, p. 9) does not, we submit, serve to make the conflict any less direct. The only difference is that, in both *Lucchese* and

[1] Petitioner in *Matles* has called the Court's attention to the instant decision, in a Supplemental Memorandum recently filed.

Costello, the District Court dismissed the complaints before trial so that the affidavits were filed before trial had actually begun [2] whereas, in this case, the affidavits were filed on the first day of trial, and the complaint was not dismissed until after the evidence had all been taken. However, the affidavit was in existence before the complaint was filed and was shown to an attorney for one of the respondents in a pre-trial conference. Respondents therefore had ample opportunity to present challenges, if any were available, to the showing of good cause effected by such affidavits. There is accordingly no basis for undoing all the proceedings that ensued after the pre-trial conference, *i.e.*, the taking of testimony of nine witnesses: four naturalization examiners (R. 45-172), three witnesses testifying to respondents' Communist Party activities (R. 173-385), one handwriting expert (R. 385-392), and one fingerprint expert (R. 394-396), and the introduction in evidence of 43 exhibits (Exs. 1 through 29, and 31 through 44).

The essential fact is that the decision below holds that the defect in filing the complaint without the affidavit cannot be cured in the same action, while the Second Circuit holds that the failure to file the affidavit with the complaint may be corrected. For the reasons set forth in the government's brief in opposition in *Lucchese* (No. 450, this Term), it is respectfully submitted that the view of the Second Circuit

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[2] The dismissal in *Costello* was on other grounds. On the affidavit issue, see the opinion of the District Court reported at 142 F. Supp. 290 (S.D.N.Y.).

is a correct one and that the decision below should be reversed.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted and the decision below should be reversed.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

FEBRUARY 1958.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,393

Dec. 31, 1957

UNITED STATES OF AMERICA,
Appellant,

vs.

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,
Appellees.

Appeals from the United States District Court for the Southern District of California Central Division.

Before: STEPHENS, Chief Judge; FEE and HAMLEY, Circuit Judges

STEPHENS, Chief Judge

The United States is here appealing from dismissals of these actions for denaturalization by Judge Ben. Harrison. The sole question raised concerns Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1451(a). We quote the applicable portion of the statute:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling

> the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation. . . ."

The complaints in these actions were filed on November 1, 1954, without the prior filing of an affidavit separate from the sworn to complaint. On March 1, 1955, the defendant-appellee David Diamond filed a motion to dismiss the complaint on the ground that the court lacked jurisdiction because the United States Attorney had not filed with the complaint an affidavit showing good cause. A similar motion was filed by defendant Freeda Diamond on March 25, 1955. The trial judge denied both motions relying on an opinion of this Court. *Schwinn* v. *United States*, 112 F.2d 74, affirmed 311 U.S. 616. The appellees then filed their answers; the cases were consolidated for trial; and the trial commenced on February 28, 1956. On the opening day of the trial, appellant offered affidavits of good cause in evidence, and they were accepted by the trial judge over objection by counsel for appellees. It was stipulated by the parties that the United States Attorney had these affidavits in his possession at the time the complaints were filed, and that they were shown to counsel for defendant-appellee Freeda Diamond at the pre-trial hearing, and that counsel was informed that the affidavits would be offered during the trial. Counsel for the Diamonds were given a copy of these affidavits on February 29, 1956, and the trial proceeded. At the conclusion of the government's case, the Diamonds rested, and the court took the case under submission. The court and counsel discussed the case of *United States* v. *Zucca*, 351 U.S. 91, and counsel were directed to file briefs on its effect on the doctrine of the *Schwinn* case. Finally Judge Harrison dismissed both the actions without prejudice, viewing *Zucca* as

holding that the filing of the affidavit prior to institution of action was an indispensable requirement. The Court could have done nothing else in the face of the following language (of Chief Justice Warren) in the *Zucca* opinion:

> (page 100)
> "We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause."

Chief Justice Warren also says, on page 99:

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, *should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause.*" (Emphasis supplied.)

Since the *Zucca* decision, the requirement that an affidavit be filed has been discussed in *Nowak* v. *United States*, 6 Cir., 238 F.2d 282, certiorari granted 353 U.S. 922; *United States* v. *Lucchese*, 2 Cir., 247 F.2d 123; *United States* v. *Matles*, 2 Cir., 247 F.2d 378; *United States* v. *Costello*, 2 Cir., 247 F.2d 384. While these cases are interesting, they present facts somewhat different from those of our case, and a detailed analysis would be fruitless.

The judgment is affirmed.

FEE, Circuit Judge:

I reserve the right to file a separate opinion.

(Endorsed:) Opinion. Filed Dec. 31, 1957.
Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,393
Jan. 10, 1958

UNITED STATES OF AMERICA,
Appellant,

vs.

DAVID DIAMOND, etc., and FREEDA DIAMOND, etc.,
Appellees.

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Before: STEPHENS, Chief Judge; FEE and HAMLEY, Circuit Judges

JAMES ALGER FEE, Circuit Judge, concurring in result:

The language and reasoning of the majority opinion go much too far. Insofar as it is held that introduction of the affidavits at trial does not satisfy the requirements in a denaturalization case, where rigid safeguards of the rights of the defendant are necessarily required, I agree. The dismissal without prejudice was proper. But it seems clear that the Supreme Court did not intend, in establishing such safeguards, to promulgate a technical formula which must be followed, to the letter and at all events, on peril of dismissal upon jurisdictional grounds. This panel should not attempt to bind the court in such manner that we cannot examine other procedural devices in subse-

quent cases where the defendant may have been fully protected by the filing of the affidavits.

(Endorsed:) Concurring Opinion. Filed Jan. 10, 1958.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,393

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID DIAMOND, etc., et al., APPELLEES

JUDGMENT

Appeals from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered:
December 31, 1957
PAUL P. O'BRIEN, Clerk.

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